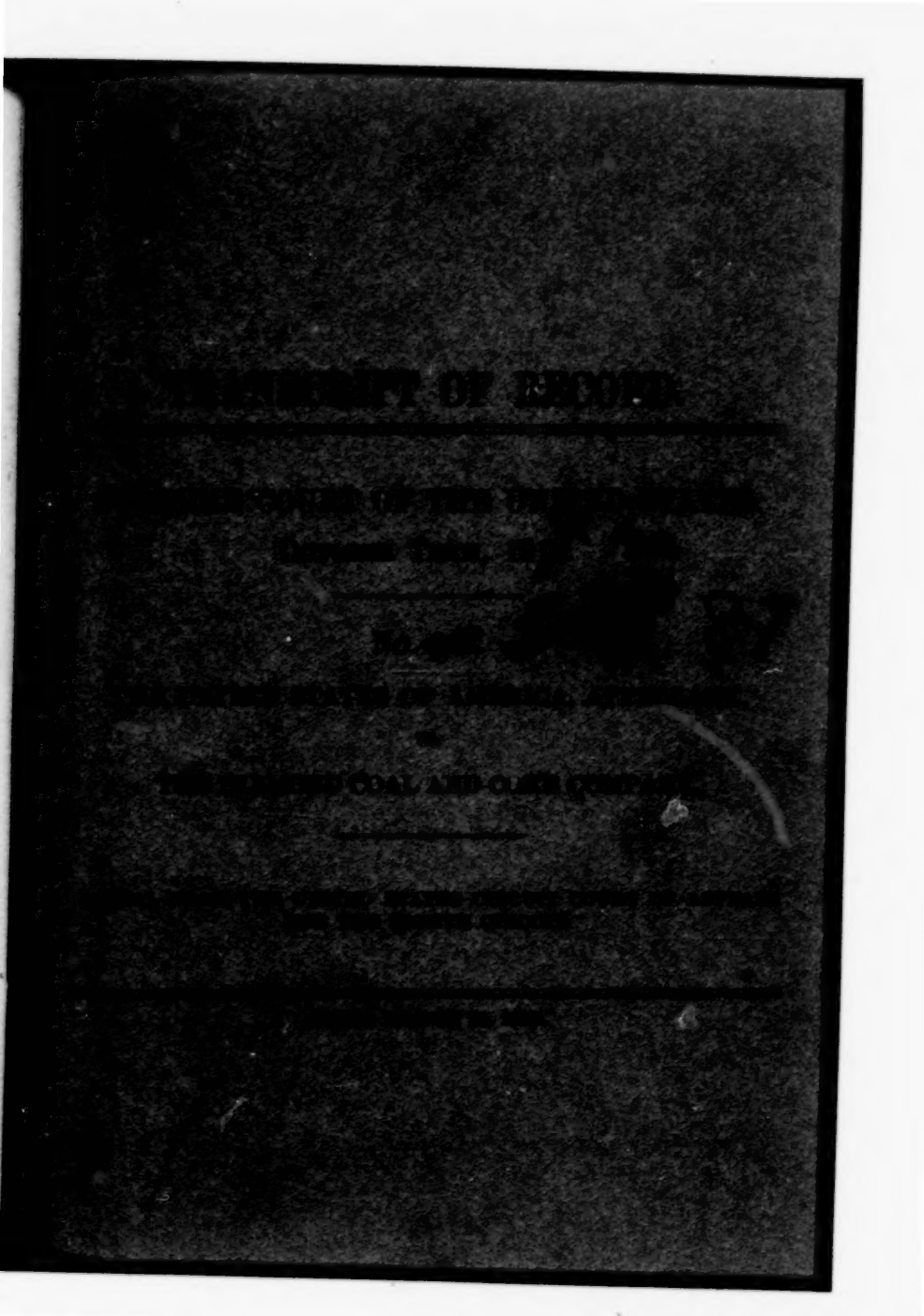


SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 948.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE DIAMOND COAL AND COKE COMPANY, A CORPORATION, APPELLEE.

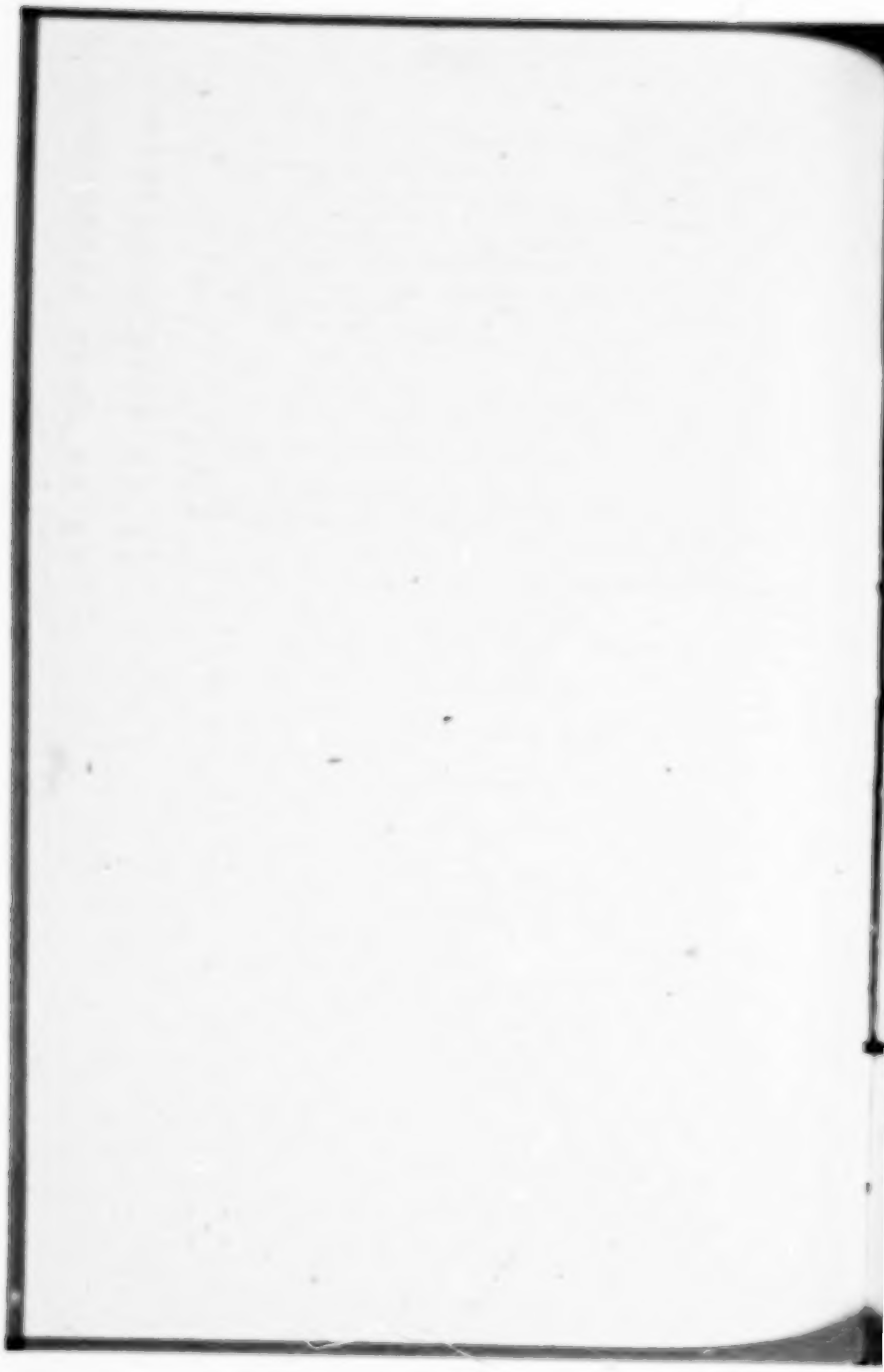
APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from U. S. Circuit Court of Appeals	a	a
Caption to transcript from U. S. District Court	1	1
Bill of complaint	1	1
Coal cash entry, No. 109, by Seward H. Fields, February 27, 1895	3	3
Coal cash entry, No. 110, by Sharp Walker, January 7, 1897	3	3
Coal cash entry, No. 111, by Lucy A. Cummings, January 20, 1897	3	3
Coal cash entry, No. 116, by Henry N. Somsen, May 24, 1898	3	3
Coal cash entry, No. 117, by Tom H. Hollingsworth, April 28 1899	4	4
Coal cash entry, No. 118, by William McKean, April 28, 1899	4	4
Coal cash entry, No. 119, by Donald McAllister, April 28, 1899	4	4
Coal cash entry, No. 120, by William C. Penman, August 15, 1899	4	4
Coal cash entry, No. 121, by William Fearn, August 15, 1899	4	4
Coal cash entry, No. 122, by James Lees, August 26, 1899	5	5
Coal cash entry, No. 123, by James Thompson, August 26, 1899	5	5
Coal cash entry, No. 124, by Marion Aitken, August 26, 1899	5	5
Coal cash entry, No. 129, by James Wanless, February 2, 1900	5	5
Coal cash entry, No. 130, by John A. Hellenthal, February 14, 1900	5	5
Coal cash entry, No. 131, by John MacCuaig, February 14, 1900	5	5
Coal cash entry, No. 132, by James F. Ellis, February 14, 1900	6	6
Coal cash entry, No. 154, David D. Alvord, February 2, 1901	6	6

Bill of complaint—Continued.	Original.	Print.
Coal cash entry, No. 173, by Frank S. Davis, September 21, 1903	6	6
Quit claim deed, February 5, 1897, and warranty deed, February 9, 1897, Seward H. Fields to Diamond Coal & Coke Company, recital of	9	9
Quit claim deed, Sharp Walker to Diamond Coal & Coke Company, February 5, 1897, recital of	9	9
Quit claim deed, Lucy A. Cummings to Diamond Coal & Coke Company, January 21, 1897, recital of	9	9
Warranty deed, Henry N. Somsen to Diamond Coal & Coke Company, July 1, 1898, recital of	9	9
Warranty deed, Tom H. Hollingworth to Diamond Coal & Coke Company, April 28, 1899, recital of	9	9
Warranty deed, William McKenn to Diamond Coal & Coke Company, April 29, 1899, recital of	9	9
Warranty deed, Donald McAllister to Diamond Coal & Coke Company, April 29, 1899, recital of	9	9
Warranty deed, William C. Penman to Diamond Coal & Coke Company, August 15, 1899, recital of	9	9
Warranty deed, William Fearn to Diamond Coal & Coke Company, August 15, 1899, recital of	9	9
Warranty deed, James Lees to Diamond Coal & Coke Company, August 26, 1899, recital of	9	9
Warranty deed, James Thompson to Diamond Coal & Coke Company, February 3, 1900, recital of	9	9
Warranty deed, Marion Aitken to Diamond Coal & Coke Company, August 26, 1899, recital of	9	9
Warranty deed, James Wanless to Diamond Coal & Coke Company, February 2, 1900, recital of	9	9
Warranty deed, John A. Hellenthal to Diamond Coal & Coke Company, February 14, 1900, recital of	9	9
Warranty deed, John MacCuaig to Diamond Coal & Coke Company, February 14, 1900, recital of	9	9
Warranty deed, James F. Ellis to Diamond Coal & Coke Company, February 14, 1900, recital of	9	9
Warranty deed, David D. Alvord to Diamond Coal & Coke Company, February 2, 1901, recital of	10	10
Warranty deed, Frank S. Davis to Diamond Coal & Coke Company, December 12, 1903, recital of	10	10
Præcipe for subpœna in chancery	13	13
Subpœna in chancery and marshal's return	13	13
Motion to dismiss bill of complaint	14	14
Order setting motion to dismiss for hearing on November 27, 1911	16	16
Order resetting motion to dismiss for hearing on December 4, 1917	16	16
Order of submission of motion to dismiss	16	16
Order sustaining motion to dismiss and fixing time for plaintiff to file amended bill of complaint	17	17
Plaintiff's election to stand on bill of complaint and refusal to plead further	17	17
Final decree of the District Court, March 11, 1918	17	17
Petition for appeal	18	18
Assignment of errors	18	18

Order allowing appeal	19	19
Citation and acknowledgment of service	19	19
Election as to printing	20	20
Precipe for transcript	20	20
Clerk's certificate to transcript	21	21
Memorandum opinion of District Court	22	22
Proceedings in the Circuit Court of Appeals	25	25
Appearance of counsel for appellant	25	25
Appearance of Mr. B. M. Ausherman as counsel for appellee	25	25
Appearance of Mr. L. O. Evans and Mr. W. B. Rodgers, as counsel for appellee	26	25
Order of submission	26	25
Opinion, U. S. Circuit Court of Appeals	27	26
Decree, U. S. Circuit Court of Appeals	35	32
Petition for appeal to Supreme Court U. S., and allowance thereof	35	32
Assignment of errors on appeal to Supreme Court, U. S.	37	33
Citation on appeal to Supreme Court, U. S., and acknowledgment of service	39	34
Clerk's certificate to transcript	41	35



Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, 1918, of said court, before the Honorable Walter H. Sanborn and the Honorable John E. Carland, circuit judges, and the Honorable James D. Elliott, district judge.

Attest:

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the second day of April, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America was appellant, and The Diamond Coal and Coke Company, a corporation, was appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 Pleas in the District Court of the United States for the District of Wyoming, sitting at Cheyenne.

Be It remembered that heretofore and on, to-wit, the eleventh day of October, in the year of our Lord, One Thousand Nine Hundred and Seventeen (1917), came The United States of America and filed in said court its Bill of Complaint, and sued out and under the seal of said court a Subpoena in Chancery against The Diamond Coal and Coke Company.

And said Bill of Complaint is in words and figures as follows, to-wit:

2 (Bill of Complaint.)

In the District Court of the United States for the District of Wyoming.

United States of America, Plaintiff,
No. 944. vs.
The Diamond Coal and Coke Company, a Corporation, Defendant.

The United States of America, by Charles L. Rigdon, United States Attorney for the District of Wyoming, acting by and under the direction of the Attorney General of the United States, brings this bill of complaint against The Diamond Coal and Coke Company, a corporation, and alleges:

I.

That the defendant The Diamond Coal and Coke Company is a corporation organized and existing under the laws of the State of Utah, but that its principal business and operations, as well as the lands hereinafter described, and its principal offices for the transaction of the business of mining, producing and selling coal, are located within the State of Wyoming and within the district thereof and within the jurisdiction of this Court.

II.

That on or about the 1st day of January, 1894, the defend-
3 ant, through its duly authorized officers, directors, agents, employees and representatives, devised a scheme to defraud the plaintiff of the title, use and possession of a large quantity of its valuable coal lands, situated

in the State of Wyoming, and in pursuance of said scheme certain of said officers, directors, agents, employees and representatives did conspire, combine and confederate together and with divers other persons to defraud the plaintiff of the title, use and possession of a large quantity of its valuable coal lands situated in the State of Wyoming, including those certain lands hereinafter particularly set forth, and obtain the title to, and use and possession of, said coal lands for the benefit of said defendant.

That it was a part of said scheme and conspiracy that said defendant, by the payment of small sums of money and other corrupt means, should induce and procure divers other persons to enter and purchase coal lands under the Coal Land Laws of the United States, said persons being hereinafter collectively described as "entrymen", ostensibly for the sole use and benefit of said entrymen respectively, but, in truth and in fact, for the use and benefit of said defendant, all under and pursuant to agreements theretofore made with said entrymen respectively, by which said entries and purchases and the title, use and possession of all the lands embraced therein should vest in and inure to the benefit of said defendant.

That in pursuance of said conspiracy, and to effect the object thereof, the defendant, acting in the premises through said conspirators, procured certain persons, being eighteen (18) in number, described herein as entrymen, to enter and purchase, at the respective dates hereinafter set forth, certain of the coal lands of the plaintiff hereinafter described, and thereupon said conspirators, or some of them, caused such proceedings to be had and taken in the United
4 States Land Office at Evanston, Wyoming, being the Land Office for the district in which said lands are situated, that those certain lands hereinafter described were entered and purchased by and in the names of said entrymen respectively. Each of said entries and purchases was effected by filing in said United States Land Office at Evanston, Wyoming, all necessary applications, affidavits, proofs and other documents accompanied by all necessary payments and other proceedings, all in manner and form as required by the laws of the United States and the rules and regulations of the Department of the Interior of the United States applicable thereto.

That at the time of making of said entries and purchases respectively, the Receiver of the United States Land Office at Evanston, Wyoming, issued his several final receipts acknowledging the payment by each of said entrymen respectively of

the purchase price required by law to be paid for the lands so entered and purchased, and the Register of the United States Land Office at Evanston, Wyoming, issued his several final certificates certifying each of said entries and purchases respectively, and thereafter, at the respective dates hereinafter set forth, the plaintiff issued its patents, bearing dates respectively, as hereinafter set forth, conveying to said entrymen respectively the legal title to said tracts of lands entered and purchased by said entrymen respectively, as aforesaid.

That the following is a list of the entries and proceedings had and made in furtherance and execution of said fraudulent scheme and conspiracy; that said list contains the names of the entrymen, the date and number of coal cash entry, the description of the lands entered and purchased by said entrymen respectively, and the dates of said patents issued under said entries and purchases, as follows, to-wit:

Seward H. Fields, Coal Cash Entry No. 109, dated February 27, 1895; description of land: Southeast quarter of the Southeast quarter (SE¼SE¼), of Section Twenty-three (23), the West half of the Southwest quarter (W½SW¼), of Section Twenty-four (24), and the Northeast quarter of the Northeast quarter (NE¼NE¼), of Section Twenty-six (26), all in Township Twenty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, May 16, 1896.

Sharp Walker, Coal Cash Entry No. 110, dated January 7, 1897; description of land: Northwest quarter (NW¼), of Section Twenty-four (24), in Township Twenty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, August 28, 1897.

Lucy Ardelle Cummings, Coal Cash Entry No. 111, dated January 20, 1897; description of land: East half of the Southwest quarter (E½SW¼), of Section Thirteen (13), in Township Twenty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, August 28, 1897.

Henry N. Somsen, Coal Cash Entry No. 116, dated May 24, 1898; description of land: West half of the Northwest quarter (W½NW¼), of Section Thirty-six (36), in Township Twen-

ty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, July 11, 1899.

Tom H. Hollingworth, Coal Cash Entry No. 117, dated April 28, 1899; description of land: West half of the Northwest quarter (W½NW¼) and West half of the Southwest quarter (W½SW¼), of Section Twenty-three (23), in Township Twenty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, July 19, 1899.

William McKean, Coal Cash Entry No. 118, dated April 28, 1899; description of land: Northeast quarter of the Southwest quarter (NE¼SW¼), the South half of the Northwest quarter (S½NW¼), and the Northwest quarter of the Northwest quarter (NW¼NW¼) of Section Twenty-six (26), in Township Twenty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, July 19, 1899.

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6 Donald McAllister, Coal Cash Entry No. 119, dated April 28, 1899; description of land: West half of the Southwest quarter (W½SW¼), the Southeast quarter of the Southwest quarter (SE¼SW¼), of Section Twenty-six (26), and the Northwest quarter of the Northwest quarter (NW¼-NW¼) of Section Thirty-five (35), all in Township Twenty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, July 19, 1899.

William C. Penman, Coal Cash Entry No. 120, dated August 15, 1899; description of land: Northwest quarter (NW¼),.of Section Thirty-two (32), in Township Twenty (20) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, April 3, 1900.

William Fearn, Coal Cash Entry No. 121, dated August 15, 1899; description of land; Southwest quarter (SW¼), of Section Thirty-two (32), in Township Twenty (20) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, April 3, 1900.

James Lees, Coal Cash Entry No. 122, dated August 26, 1899; description of land: Southwest quarter (SW¼), of Section Eight (8), in Township Nineteen (19) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, February 3, 1900.

James Thompson, Coal Cash Entry No. 123, dated August 26, 1899; description of land: Northwest quarter (NW¼), of Section Eight (8), in Township Nineteen (19) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, February 3, 1900.

Marion Aitken, Coal Cash Entry No. 124, dated August 26, 1899; description of land: Southeast quarter of the Southeast quarter (SE¼SE¼), of Section Eighteen (18), in Township Nineteen (19) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, February 3, 1900.

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7 James Wanlass, Coal Cash Entry No. 129, dated February 2, 1900; description of land: West half of the Northeast quarter (W½NE¼), and the West half of the Southeast quarter (W½SE¼), of Section Twenty-three (23), in Township Twenty-one (21) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, October 3, 1900.

John A. Hellenthal, Coal Cash Entry No. 130, dated February 14, 1900; description of land: Lots One (1), Two (2), Three (3) and Four (4), of Section Eighteen (18), in Township Nineteen (19) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, October 3, 1900.

John MacCuaig, Coal Cash Entry No. 131, dated February 14, 1900; description of land: Southwest quarter of the Southeast quarter (SW¼SE¼), and East half of the Southwest quarter (E½SW¼), of Section Eighteen (18), in Township Nineteen (19) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, October 3, 1900.

James F. Ellis, Coal Cash Entry No. 132, dated February 14, 1900; description of land: North half of the Northeast quarter (N½NE¼), of Section Eighteen (18), Township Nineteen (19) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, October 3, 1900.

David D. Alvord, Coal Cash Entry No. 154, dated February 2, 1901; description of land; Southwest quarter of the Southeast quarter (SW¼SE¼), of Section Twenty (20), in Township Twenty (20) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, October 3, 1901.

Frank S. Davis, Coal Cash Entry No. 173, dated September 21, 1903; description of land: South half of the Northeast quarter (S½NE¼), of Section Eighteen (18), in Township Nineteen (19) North, of Range One hundred sixteen (116) West of the Sixth Principal Meridian; date of patent, November 16, 1903.

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8 That all of said lands embraced in said entries were vacant and unoccupied coal lands of the United States, a part of the public domain of the United States and subject to entry and purchase under the Coal Land Laws of the United States, and located within the Evanston, Wyoming, Land District, comprising more than two thousand two hundred eighty-three (2,283) acres, and were and are of great value, to-wit, of the value of more than one million dollars.

That for the purpose of deceiving the Register and Receiver of the said Evanston Land Office, and other officers and officials of the plaintiff, the said conspirators did make, or cause to be made, and file, or cause to be filed, with the officers of the Evanston, Wyoming, Land Office aforesaid, in the case of each and every entry of lands, as hereinbefore set forth, a certain affidavit of each of said entrymen respectively in support of his aforesaid entry and purchase, which said affidavit was in form and substance as required by the laws of the United States and the rules and regulations of the Department of the Interior of the United States applicable thereto, wherein and whereby he, the said entryman, did state, represent and swear, among other things, that he, said entryman, had expended a certain sum of money in developing coal mines on the tract of land entered and purchased by him as afore-

said, and that he was then in the actual possession of said mines, and said land, and that he made said entry for his own use and benefit, and not directly or indirectly for the use or benefit of any other person or party, all of which statements and representations were and are false and fraudulent, and were known to said conspirators and to said entrymen respectively and to said defendant to be false, fraudulent and untrue, in this, that none of said entrymen had ex-
9 pended any sum of money whatsoever in developing any coal mines upon any of said lands, but, in truth and in fact, the only money that had ever been expended in that behalf had been furnished and expended by and on behalf of said defendant, and that none of said entrymen were ever in possession of said lands or any mines thereon, but on the contrary all of said lands and all mines thereon then were in the possession of said conspirators, or some of them, acting for and on behalf of said defendant, as aforesaid, and that none of said entries or purchases respectively were made for the use or benefit of said entrymen respectively, but on the contrary each of said entries and purchases was made solely for the use and benefit of said defendant, as aforesaid.

Each of said entries and purchases was made by the said entrymen respectively as the agents for and on behalf of, and for the use and benefit of said defendant, and pursuant to an agreement theretofore made between said conspirators acting for and on behalf of the said defendant and said entrymen respectively, whereby the said entrymen agreed to enter, purchase and acquire title to said lands for the use and benefit of said defendant, and convey the title to said lands to said defendant. It was understood and agreed by and between said defendant, acting through its officers, agents, directors, employees and representatives, and said entrymen, that said defendant should select the lands to be filed upon, entered and purchased, and should pay all filing fees, expenses and costs incurred in making said entries, and pay the purchase price of said lands, and that said entrymen should receive some small sum of money as compensation for services and for making said entries as aforesaid; that none of said entrymen were to receive, or did receive any benefit from said entries or purchases other than the sums of money agreed to be paid for the making of said entries, and that said entries were made wholly in the interest of and by direction of said defendant acting through said conspirators; that all costs, ex-
10 penses and fees incurred in making said entries and purchases were paid by and on behalf of said defendant, and that the purchase price of said lands paid to the

United States for the purchase of the lands involved in each of said entries respectively was paid by and on behalf of said defendant, and that said entrymen for the making of said entries and purchases aforesaid were paid by said defendant various small sums of money, the exact amount of which is to plaintiff unknown; that all of said entries and purchases were made by the procurement of said defendant, acting through said conspirators, acting in a secret and hidden manner with the purpose of preventing the plaintiff and its officers of the Land Department from knowing or learning of the agreements and undertsanding existing between said defendant and said entrymen, and with an understanding between said entrymen and all of the parties to said transactions that the true facts relating to said transactions should be concealed from the knowledge of the officers of the United States whose duty it was to decide whether such entries and purchases should be accepted and approved and patents issued thereunder, and that at all times herein mentioned and at all times thereafter said conspirators and said entrymen unlawfully, fraudulently and wickedly concealed from the plaintiff and from the officers of the plaintiff having authority in the premises the true facts and circumstances under which said entries and purchases were made.

That said representations, affidavits and statements aforesaid constituted the only evidence or means of information available to any of the officers of the United States having or exercising any authority in the matter of deciding whether said entries or purchases should be accepted, approved and patents issued thereunder.

Said officers of the said United States Land Office at Evanston, Wyoming, and the General Land Office at Wash-
11 ington, and the Interior Department charged with such matters, as aforesaid, were deceived and misled by said affidavits, entries and purchases as aforesaid, and by said fraudulent devices and appearances, and believed and relied upon said affidavits, entries and purchases, and believed that said entrymen were in possession of said lands as aforesaid and had developed coal mines thereon as aforesaid, and that said entries were made for the use and benefit of said entrymen respectively, and not directly or indirectly for the use or benefit of any other person or persons whomsoever, and were at all times in ignorance of said conspiracy and of the aforesaid purpose and fraudulent character of said entries, and because of such relief, reliance and ignorance, and not otherwise, caused the said entries to be allowed, and the said Receiver's

receipts and Register's certificates and patents to be issued, in the manner and form as hereinbefore alleged.

That in further pursuance of said conspiracy and to effect the object thereof, each of said entrymen respectively conveyed the land embraced in his said entry to said defendant, as follows:

The said Seward H. Fields, by Quit-claim Deed, dated February 5, 1897, and by Warranty Deed, dated February 9, 1897.

The said Sharp Walker, by Quit-claim Deed, dated February 5, 1897.

The said Lucy Ardelle Cummings, by Quit-claim Deed, dated January 21, 1897.

The said Henry N. Somsen, by Warranty Deed, dated July 1, 1898.

The said Tom H. Hollingworth, by Warranty Deed, dated April 28, 1899.

The said William McKean, by Warranty Deed, dated April 29, 1899.

12 The said Donald McAllister, by Warranty Deed, dated April 29, 1899.

The said William C. Penman, by Warranty Deed, dated August 15, 1899.

The said William Fearn, by Warranty Deed, dated August 15, 1899.

The said James Lees, by Warranty Deed, dated August 26, 1899.

The said James Thompson, by Warranty Deed, dated February 3, 1900.

The said Marion Aitken, by Warranty Deed, dated August 26, 1899.

The said James Wanlass, by Warranty Deed, dated February 2, 1900.

The said John A. Hellenthal, by Warranty Deed, dated February 14, 1900.

The said John MacCuaig, by Warranty Deed, dated February 14, 1900.

The said James F. Ellis, by Warranty Deed, dated February 14, 1900.

The said David D. Alvord, by Warranty Deed, dated February 2, 1901.

The said Frank S. Davis, by Warranty Deed, dated December 12, 1903.

That said conveyances hereinbefore set out were made by said entrymen respectively wholly in pursuance of the unlawful understanding and agreements to that end existing at and prior to the entries of said lands and at and prior to the purchase of said lands as hereinbefore set out, and were solicited and directed by said defendant, acting through its officers and agents and through said conspirators, all in pursuance of said fraudulent and unlawful conspiracy, and that no consideration was paid to said entrymen on account of said
13 conveyances, except such moneys as said defendant paid to said entrymen respectively on account of services in making said entries as aforesaid and in making said conveyances as aforesaid.

Plaintiff alleges that said defendant was not a purchaser of said lands, or of any of said lands, in good faith for a valuable consideration, but in truth and in fact the said defendant received and took the same with full and complete knowledge and notice that said lands were obtained in fraud and violation of the laws of the United States and against the legal and equitable rights of the plaintiff, by means of the various frauds and fraudulent practices hereinbefore set forth and without consideration to the plaintiff therefor.

That at all times said conspirators and said entrymen and said defendant fraudulently, unlawfully and dishonestly concealed from the aforesaid officers of the United States having authority in the premises the aforesaid fraudulent practices and the true circumstances under which said entries and purchases were made, as aforesaid, all of which has at all times been well known to and taken advantage of by said defendant; that said several frauds, fraudulent devices and misrepresentations aforesaid were known only to said conspirators and said defendant, and were perpetrated secretly and were of such a nature as to conceal themselves.

That neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff, as aforesaid, except that on or about the month of November, 1916, there was filed in the General Land Office of the United States at Washington, D. C., a report upon said entries by one John A. Smith, Special Agent of the Department

of the Interior; that immediately thereupon and at all times thereafter the Department of the Interior of the United States and the Department of Justice of the United States
14 have been engaged in the continuous and diligent prosecution of the work of investigating and ascertaining the true facts in the premises and in preparing and instituting appropriate judicial proceedings to enforce the rights and remedies of the plaintiff in the premises.

It was a part of said conspiracy and understood and agreed among said conspirators, said defendant and said entrymen, that said frauds and said conspiracy and the true facts surrounding said entries and purchases should at all times be concealed from the plaintiff, to the end and with the purpose that said plaintiff might be delayed, hindered and prevented from instituting any suit or legal proceeding for the recovery of said lands until lapse of time should enable the defendant to plead delay in the institution of said suit, but plaintiff alleges that in consideration of the premises the defendant is and should be forever estopped from setting up or alleging delay in the institution of said suit in defense thereof.

The plaintiff further shows that the defendant herein is, and has been for many years past, engaged in the mining, production and sale of coal in the State and District aforesaid; that its operations have been principally carried on in the vicinity of the lands involved in this suit; that plaintiff is advised and believes, and, therefore, alleges that the lands herein involved have been mined for coal and large quantities of coal removed therefrom, and that said lands are now being mined and operated; that said lands have been so mined and operated by the defendant to the great and irreparable injury of the plaintiff; that plaintiff will suffer further great and irreparable injury before plaintiff may have fully recovered its title to and possession of said lands from defendant, unless by proper order of Court defendant is restrained from further mining or operating said lands during the pendency of this suit; that plaintiff is justly entitled in equity to an account of the coal produced, used or sold by said defendant
15 from said lands, and that defendant ought in equity to be compelled under the proper order and direction of this Court to account to plaintiff for the same, and should be required to pay plaintiff the reasonable value of the coal taken from said lands.

Wherefore, plaintiff prays that each and all of the patents hereinbefore described and which were issued by plaintiff in the names of said fraudulent entrymen respectively may be

set aside and declared null and void and may be delivered up and cancelled, and that the said several deeds of conveyance from said entrymen to said defendant may be set aside and declared null and void and may be delivered up and cancelled, and that it may be decreed that the plaintiff was and is the owner of all the lands mentioned and described as aforesaid; and that an account may be taken of any coal which may have been mined, produced or sold from said lands by said defendant, or under its permission or authority, and defendant required to pay plaintiff therefor; that defendant, its officers, agents, servants and employees may be restrained by order of the Court from operating upon or within the lands hereinbefore described, and from mining, producing or selling the coal therefrom and from in any wise incumbering or disposing of said lands during the pendency of this suit, and that plaintiff may have such other and further relief in the premises as may be meet and proper and in accordance with equity and good conscience.

CHARLES L. RIGDON,
United States Attorney for
the District of Wyoming.

16 United States of America,
District of Wyoming,
County of Laramie—ss.

A. Baker, being first duly sworn, deposes and says: that he is now, and for many years last past has been, in the service of the United States and Chief of the Field Division of the General Land Office of the Department of the Interior of the United States, and charged with the investigations relating to public lands of the United States lying and being in the State of Wyoming and including the lands described in the foregoing Bill of Complaint and the enforcement and protection of the proprietary and other rights of the United States with reference to said public lands; that he has read the above and foregoing Bill of Complaint, and knows the contents thereof, and that the acts and transactions referred to in said Bill of Complaint are true, as he verily believes.

A. BAKER.

Subscribed in my presence and sworn to before me this 11th day of October, A. D. 1917.

(Seal)

CHARLES J. OHNHAUS, Clerk,
By Florence Bradley, Deputy.

Endorsed: Filed in the District Court on Oct. 11, 1917.

17 (Praecipe for Subpoena in Chancery.)

The Clerk will issue a Subpoena in Chancery in the above entitled cause, for service upon the above named defendant.

To Charles J. Ohnhaus, Clerk. C. L. RIGDON,
Attorney for Plaintiff.

Cheyenne, Wyoming, October 11, 1917.

Endorsed: Filed in the District Court on October 11, 1917.

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18 (Subpoena in Chancery and Marshal's Return.)

In the District Court of the United States for the District of Wyoming Sitting at Cheyenne.

The President of the United States of America, To the Diamond Coal and Coke Company, a corporation—Greeting:

You and each of you are hereby commanded, that you appear before the Judge of the District Court of the United States, for the District of Wyoming, at the city of Cheyenne, in said District, twenty days from the date hereof, to answer the Bill of Complaint of United States of America, this day filed in the office of the Clerk of said Court, in said city of Cheyenne, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said Bill of Complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the District of Wyoming to execute and make due return.

Witness, the Honorable John A. Riner, Judge of the District Court of the United States, for the District of Wyoming, and the seal of the said District Court, at the city of Cheyenne aforesaid, this eleventh day of October, in the year of our Lord one thousand nine hundred and seventeen and of the independence of the United States, the 142nd year.

(Seal) CHARLES J. OHNHAUS, Clerk,
By Florence Bradley, Deputy Clerk.

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19 Memorandum.

The above named defendant is hereby notified that unless it and each of them shall file their answer or other de-

fense in the office of the Clerk of said Court, at the city of Cheyenne aforesaid, on or before the twentieth day after service, excluding the day thereof, the Bill of Complaint may be taken pro confesso.

CHARLES J. OHNHAUS, Clerk,
By Florence Bradley, Deputy Clerk.

Marshal's Return.

United States of America,
District of Wyoming—ss.

Cheyenne, Oct. 16th, 1917.

I have duly executed the within writ, by delivering to Thomas Sneddon, Superintendant and the designated agent for service for the Diamond Coal and Coke Company, personally, a true copy of the within writ, at the place and time as follows, to-wit: As to Thomas Sneddon on the 15th day of October, A. D. 1917, at Diamondville in Lincoln County, in the district of Wyoming.

This writ therefore returned served, as the law directs, this 17th day of October, A. D. 1917.

Marshal's Fees
Service, 1 persons, at
$2.00 each .....$ 2
Mileage, ..miles at 6c.
Going only $....
Expenses $11.35
Total $13.35

DANIEL F. HUDSON, Marshal
By Edmond H. Brannan,
Deputy Marshal.

20 Endorsed: Filed in the District Court on October 17, 1917.

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21 (Motion to Dismiss Bill of Complaint.)

Now comes the above named defendant, Diamond Coal and Coke Company, and moves this Honorable Court to dismiss the bill of complaint of the plaintiff on file herein, which said motion is based upon the following grounds and for the following reasons:

(a) That the plaintiff has not, in or by its said bill, made or stated such a case as does or ought to entitle it to any such

relief as is thereby sought and prayed for from or against this defendant, or stated such a case as, in equity, entitles the said plaintiff to any relief against the said defendant; and that said bill of complaint does not contain any facts whatsoever constituting a cause of action, either legal or equitable, in favor of the plaintiff and against the defendant.

(b) That it appears upon the face of, and from the allegations contained in, said bill of complaint, that plaintiff's alleged causes of action, and each thereof, if any plaintiff ever had, are barred by the statutes of limitation of actions of the United States, and by the provision of the Act of March 3, 1891, Chapter 559, 26 Statutes at Large, 1093. That it appears upon the face of said bill of complaint that said
22 bill of complaint was not filed, or said suit begun, within six (6) years after the date of the issuance of the United States patent set out and described in said bill of complaint, or within six (6) years of the date of the issuance of either thereof; and no facts are stated or pleaded in said bill of complaint which, either in law or equity, excuseth the said plaintiff from filing said bill of complaint and bringing said suit within six (6) years after the date of the issuance of such United States patents, or within six years after the date of the issuance of some one thereof.

(c) That it appears from the allegations in, and from the face of, said bill of complaint, that the said plaintiff has been guilty of such negligence and laches, in the filing of said bill of complaint and bringing said suit, that the said paintiff is, and by right ought to be, now and forever estopped from maintaining or prosecuting the same against this defendant.

Wherefore, defendant prays that said bill of complaint be dismissed and said suit of said plaintiff be dismissed, and that said defendant have such other relief as, upon the granting of this motion, it may be entitled to in equity.

L. O. EVANS, W. B. RODGERS,
D. M. KELLY,
and B. M. AUSHERMAN,
Solicitors for the defendant, the
Diamond Coal & Coke Company.

L. O. Evans,
Of counsel for the defendant, the
Diamond Coal & Coke Company.

23 Service of the foregoing motion acknowledged, and copy received, this 2nd day of November, A. D. 1917.

DAVID J. HOWELL,
Asst. United States Attorney for the District of Wyoming, Solicitor for the Plaintiff, United States of America.

Endorsed: Filed in the District Court on Nov. 2, 1917.

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24 (Order setting motion to dismiss, for hearing on November 27, 1911.)

It Is Ordered by the Court that the hearing on the motion to dismiss herein be, and the same is hereby set for Tuesday, November 27, A. D. 1917, at ten o'clock in the forenoon.

JOHN A. RINER,
Judge.

Endorsed: Filed in the District Court on Nov. 12, 1917.

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25 (Order resetting motion to dismiss, for hearing on December 4, 1917.)

It Is Ordered by the Court that the hearing on the motion to dismiss herein be, and the same is hereby reset for Tuesday, December 4, A. D. 1917, at ten o'clock in the forenoon.

JOHN A. RINER,
Judge.

Endorsed: Filed in the District Court on Nov. 22, 1917.

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26 (Order of submission of motion to dismiss.)

This cause comes on now to be heard upon the motion to dismiss herein, Charles L. Rigdon, Esquire, appearing as solicitor for plaintiff, and W. B. Rogers, Esquire, appearing as solicitor for defendant, and the motion to dismiss is argued by counsel and by the court taken under advisement.

JOHN A. RINER, Judge.

Endorsed: Filed in the District Court on December 4, 1917.

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27 (Order sustaining Motion to Dismiss and fixing time for Plaintiff to file amended Bill of Complaint.)

This cause came on to be heard at this term of court upon motion of defendant, Diamond Coal and Coke Company, to dismiss bill of complaint, and was argued by counsel, Charles L. Rigdon, Esquire, appearing as solicitor for Complainant, and W. B. Rogers, Esquire, appearing as solicitor for the Defendant;

And thereupon, on consideration thereof, it is ordered by the court that the said motion to dismiss be, and the same is hereby, sustained, and the complainant is allowed ninety days from this date within which to file its amended bill of complaint herein, to which ruling and order of the court complainant by its solicitor excepts.

JOHN A. RINER, Judge.

Endorsed: Filed in the District Court on Dec. 29, 1917.

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28 (Plaintiff's Election to stand on Bill of Complaint and refusal to plead further.)

Comes now Charles L. Rigdon, United States Attorney for the District of Wyoming, appearing on behalf of the plaintiff, and said that the plaintiff will and does hereby elect to stand upon the bill of complaint herein, and declines to plead further.

CHARLES L. RIGDON,
United States Attorney for the
District of Wyoming.

Endorsed: Filed in the District Court on March 11, 1918.

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29 (Final Decree of District Court, March 11, 1918.)

United States of America, Plaintiff,
No. 944. vs. Civil.
Diamond Coal and Coke Company, a corporation, Defendant.

It being made to appear to the Court that the plaintiff herein has in writing elected to stand upon its bill of complaint, without amending, as authorized by the order entered herein on the 12th day of November, A. D. 1917, it is therefore ordered, adjudged and decreed by the court that the bill of com-

plaint herein be, and the same is hereby dismissed, to which order and decree of the court, plaintiff by its counsel excepts.

JOHN A. RINER, Judge.

Endorsed: Filed in the District Court on March 11, 1918.

30

Petition for Appeal.

The plaintiff, United States of America, feeling itself aggrieved by the final decree made and entered in this cause on the 11th day of March, 1918, does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES L. RIGDON,
United States Attorney and
Solicitor for the Plaintiff.

Endorsed: Filed in the District Court on March 11, 1918.

31

Assignment of Errors.

Comes now the plaintiff, United States of America, and files this its assignment of errors upon which it will rely upon its appeal from the final decree herein heretofore entered by said Court; that said District Court erred in making and entering said decree and in the proceedings in said cause, to-wit:

First: That said Court erred in sustaining the motion of the defendant, The Diamond Coal and Coke Company, to dismiss the bill of complaint herein;

Second: That said Court erred in making and entering a decree against the plaintiff and in favor of the defendant dismissing the bill of complaint herein.

Wherefore, the plaintiff, United States of America, appealing, prays that the decree entered as aforesaid dississing the bill of complaint herein be wholly set aside, annulled, reversed and held for naught; that the case between the plaintiff and the defendant be remanded to the District Court with directions to overrule the motion of the defendant and require the

defendant to answer said bill of complaint, and for such
32 other, further and different relief to which it may in equity and good conscience be entitled.

CHARLES L. RIGDON,
United States Attorney for the District of Wyoming, and Solicitor for the Plaintiff.

Endorsed: Filed in the District Court on March 11, 1918.

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33 Order Allowing Appeal.

Now on this 11th day of March, A. D. 1918, the same being one of the regular judicial days of the November, A. D. 1917, Term of said court, comes the plaintiff, United States of America, and presents its petition, in writing, for an appeal from that certain decree made and entered herein on the 11th day of March, 1918, to the United States Circuit Court of Appeals for the Eighth Circuit, together with an assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby granted and allowed, and the Court hereby allows an appeal from the said decree to the United States Circuit Court of Appeals for the Eighth Circuit.

JOHN A. RINER, Judge.

Endorsed: Filed in the District Court on March 11, 1918.

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34 (Citation and Acknowledgment of Service.)

United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

United States of America; To The Diamond Coal and Coke Company, a Corporation—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri, sixty days from and after the date this citation bears date pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, sitting at Cheyenne, Wyoming, wherein the United States of America is appellant and The Diamond Coal and Coke Company, a Corporation, is appellee, to show cause, if any there be, why the order and decree rendered against said appellant as in said appeal mentioned should not be cor-

rected and speedy justice should not be done the parties in that behalf.

Witness the Honorable John A. Riner, Judge of the District Court of the United States for the district of Wyoming, this 11th day of March, A. D. 1918.

Seal
U. S. Dist. Court,
Dist. of Wyoming.

JOHN A. RINER, Judge.

Proof of Service:

Due and legal service of the within citation and receipt of a copy thereof is hereby acknowledged at Cheyenne,
35 Wyoming, this 18th day of March, A. D. 1918.

L. O. EVANS, W. B. RODGERS,
D. M. KELLY and B. M. AUSHERMAN,
Solicitors for Appellee, The Diamond Coal and Coke Company, a Corporation.

Endorsed: Filed in the District Court on March 19, 1918.

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36 (Election as to Printing.)

In accordance with Paragraph 2 of Section B of the Rules of the District Court of the United States for the District of Wyoming, I hereby direct the Clerk to prepare transcript to be printed under the supervision of the Clerk of the Appellate Court, as prescribed by said Paragraph.

C. L. RIGDON,
United States Attorney for t'
District of Wyoming.

Endorsed: Filed in the District Court on March 19, 1918.

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37 (Praecipe for Transcript.)

The Clerk of the United States District Court for the District of Wyoming is hereby directed to prepare a transcript on appeal in the above entitled case consisting of the following:

Bill of Complaint;

Praecipe for Subpoena in Chancery;

Subpoena in Chancery;

Motion to Dismiss;

Order setting hearing on Motion to Dismiss;

Order resetting hearing on Motion to Dismiss;

Motion to dismiss argued and taken under advisement;

Order sustaining motion to dismiss and allowing time to file amended bill;

Election to stand upon bill;

Final decree dismissing bill of complaint;

Judge's Memorandum;

Petition for order allowing appeal;

Assignment of Errors;

Order allowing appeal;

Citation;

Election as to printing of transcript upon appeal.

Praecipe for transcript.

C. L. RIGDON,
United States Attorney for the
District of Wyoming.

38 Endorsed: Filed in the District Court on March 19, 1918.

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39 (Clerk's Certificate to Transcript.)

United States of America,
District of Wyoming—ss.

I, Charles J. Ohnhaus, Clerk of the District Court of the United States for the District of Wyoming, do hereby certify the above and foregoing pages (1) to (43), both inclusive, to be a true, correct and complete transcript and copy of the record and proceedings and of all thereof, as directed by Precipe for Transcript, in a certain cause lately in said Court pending, wherein United States of America is plaintiff, and The Diamond Coal and Coke Company, is defendant, as full and complete as the same still remains on file and of record in my office at Cheyenne.

Seal
U. S. Dist. Court,
Dist. of Wyoming.

In Testimony to the above, I do hereto sign my name and affix the seal of said Court, at Cheyenne, in said district, this twenty-first day of March A. D. 1918.

CHARLES J. OHNHAUS,
Clerk of U. S. District Court,
District of Wyoming.

This was a suit brought by the United States seeking the cancellation of certain patents to public lands issued to parties named in the bill on the ground, as alleged in the bill, that the patents were fraudulently obtained. The bill then sets out at some length the acts constituting the alleged fraud. The patents were all issued more than six years prior to the commencement of the suit, the date of their issue varying from 14 to 20 years prior to the time the suit was brought. It then alleges that the defendant and the parties to whom the patents were issued, fraudulently, unlawfully and dishonestly concealed, from the officers of the United States having authority in the premises, these fraudulent practices.

It is further alleged that neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff, except that on or about the month of November, 1916, when one John A. Smith, a Special Agent of the Department of the Interior, filed in the General Land Office a report upon said entries and that immediately thereupon and at all times thereafter up to the time the suit was brought the plaintiff was engaged in the continuous and diligent prosecution of the work of investigating and ascertaining
the true facts and in instituting appropriate judicial
41 proceedings to enforce its rights.

The case is before the court upon a motion to dismiss the bill on the grounds, (1) that it does not contain facts sufficient to constitute a cause of action, either legal or equitable, in favor of the plaintiff and against the defendant; (2) that the bill shows upon its face that the plaintiff has been guilty of such negligence and laches in bringing its suit that it ought to be estopped from maintaining or prosecuting the same.

Section 8 of the Act of March 3, 1891, provides: That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. This is a self-imposed statute of limitations, but the Court of Appeals of the Eighth Circuit, in the case of United States vs. Exploration Co., 203 Fed. 387, and the Court of Appeals in the Ninth Circuit, in the case of Linn & Lane Timber Co. vs. United States, 196 Fed. 593, have held that the statute was subject to the equitable rule that where the failure to discover the fraud was due to concealment by the other party, or was not chargeable to the

neglect or lack of diligence of the plaintiff, the statute would not commence to run until the discovery of the fraud. In the cases just cited the patents were sought to be annulled, as in this case, on the ground that the entries were made for the benefit of others and the concealment there charged was the withholding from record of deeds transferring the land. The rule is thus stated in Bailey vs. Glover, 21 Wall. 342: "In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in respect of the doctrine that,

where the ignorance of the fraud has been produced by
42 affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that, in suits in equity, the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

While it is quite true that the plaintiff is never required to plead his evidence, but only ultimate facts, yet I do not think the bare allegation of concealment without more is sufficient. That is pleading nothing more than a conclusion of law. He must set out acts which constitute the concealment so that the court may say whether or not they are sufficient to excuse the plaintiff from bringing the suit within the time fixed by the statute. The rule of pleading in such cases is clearly stated by the Supreme Court in Wood. vs. Carpenter, 101 U. S. 135: "In this class of cases the plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made .... A general allegation of ignorance at one time and knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, and how it was made, and why it was not made sooner." What may appear to the pleader to be a sufficient concealment on the one hand and an exercise of diligence on the other to avoid the bar of the statute may not be so re-

garded by the court. At least it is a question for the
43 court to determine from the facts set out in the pleading. As stated by Judge Neterer in United States vs. Traction Co., 215 Fed. 349: "It is necessary that facts be

stated rather than conclusions, not only so that the court may determine the sufficiency of the pleading, but also that the adverse party may know with what he is charged and how to answer it."

The statute is absolute in its terms and limits the right to bring suits to six years from the date of the patent, and the equitable rule of concealed fraud qualifying the absolute terms of the statute placed upon it by judicial construction is the rule as developed, defined and expounded by courts of equitable jurisdiction and does not relieve the plaintiff from stating a case within that rule in his bill.

As stated by the court in the case last referred to: "Equity recognizes no such doctrine as that the statute of limitations will be tolled by mere ignorance unaccompanied by a showing of due deligence or concelment of fraud. How, then, can it be read into the statute as a rule of equity."

The motion to dismiss will be sustained and the plaintiff given ninety days within which to file an amended bill.

Plaintiff will be allowed an exception.

Endorsed: Filed in the District Court on Dec. 29, 1917.

Filed Apr-2 1918. E. E. Koch, Clerk.

25 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of counsel for appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
THE DIAMOND COAL AND COKE COMPANY, A CORPORATION } No. 5146.

The clerk will enter my appearance as counsel for the appellant.

CHARLES L. RIGDON,
DAVID J. HOWELL,
Cheyenne, Wyo.

(Endorsed:) Filed in U. S. Court of Appeals, Apr. 6, 1918.

(Appearance of Mr. B. M. Ausherman as counsel for appellee.)

The clerk will enter my appearance as counsel for the appellee.

B. M. AUSHERMAN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 24, 1918.

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26 (Appearance of Mr. L. O. Evans and Mr. W. B. Rodgers, as counsel for appellee.)

The clerk will enter my appearance as counsel for the appellee.

L. O. EVANS, *of Butte, Montana.*
W. B. RODGERS, *of Butte, Montana.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 25, 1918.

(Order of submission.)

September Term, 1918.

TUESDAY, *September* 10, 1918.

This cause having been called for hearing in its regular order, argument was commenced by Mr. David J. Howell, Assistant United States attorney, for appellant, continued by Mr. W. B. Rodgers for appellee and concluded by Mr. David J. Howell for appellant.

Thereupon, this cause was submitted to the court on the transcript of the record from said District Court and the briefs of counsel filed herein.

United States Circuit Court of Appeals, Eighth Circuit.

No. 5146.

December term, A. D. 1918.

UNITED STATES OF AMERICA, APPELLANT, vs. THE DIAMOND COAL AND COKE CO., APPELLEE.	Appeal from the District Court of the United States for the District of Wyoming.

Mr. David J. Howell, assistant United States attorney (Mr. Charles L. Rigdon, United States attorney, was with him on the brief), for appellant.

Mr. W. B. Rodgers (Mr. L. O. Evans, Mr. D. M. Kelly, and Mr. B. M. Ausherman were with him on the brief) for appellee.

Before SANBORN and CARLAND, Circuit Judges, and ELLIOTT, District Judge

Statement.

This is a suit in equity, brought by the United States against the Diamond Coal and Coke Company, a corporation, to avoid for fraud in obtaining them the patents to eighteen tracts of land aggregating 2,283 acres and the deeds thereof made by the eighteen patentees to the coal company. The alleged fraud was the hiring and causing by the coal company of dummy entrymen to enter as coal lands, procure patents for, and to convey the lands in controversy to the coal company at its expense and for its benefit by means of false representations to the local land officers of the United States that each entryman had expended the requisite sums of money in developing the coal mines upon the land he entered, that he was in the actual possession of that land, that he made his entry for his own use and benefit and not directly or indirectly for the use or benefit of
28 any other person or party, when the facts were that the coal company was in the actual possession of all the land, that it had paid all the expenses of developing mines thereon and all the expenses of entering it, and that it was entered for the benefit of the coal company, and not for the use or benefit of any of the entrymen, all of whom conveyed the lands they respectively entered to the coal company immediately after they finally entered them. The plaintiff alleged that this fraud was perpetrated between February 26, 1895, and December 13, 1905, and that prior to the latter date all the entrymen had conveyed the lands they respectively entered to the coal company. This suit was commenced on October 17, 1917, a little more than thirteen years and nine months after the completion of the

fraud. The coal company made a motion to dismiss the bill of complaint on the grounds that it failed to state a case which entitled the plaintiff to any relief in equity, that it disclosed the facts that the alleged cause of action was barred by the act of Congress, and that the plaintiff was guilty of such negligence in failing to discover the fraud and commence the suit, that it was estopped from maintaining it. The court below granted the motion and the complainant appealed.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The act of Congress of March 3, 1891, chap. 561, 26 Statutes 1099, Complied Statutes 1916, section 5114, provides: "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years after the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years, after the date of the issuance of such patents." But this statute is construed and enforced pursuant to decisions of the Federal courts in cooperation with the familiar equitable principle that where the victim of a concealed fraud exercises reasonable diligence to discover it and fails so to do, or to receive such notice thereof as would excite the attention of, and incite a person of ordinary prudence and ability in his place to an inquiry which would have led to a discovery of the fraud, the cause of action for the fraud does not accrue until such discovery or the receipt of such notice. Exploration Company v. United States, 38
29 Supreme Court Reporter, 571; United States v. Exploration Company, 203 Fed., 387, 121 C. C. A., 491; Exploration Co. v. United States, 235 Fed. 110, 111, 148 C. C. A. 604; Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; Bailey v. Glover, 88 U. S. 342, 348. In the case last cited, which is approved in Exploration Co. v. United States, 38 Sup. Court Reporter 571, the Supreme Court after stating that ignorance of the fraud produced by affirmative acts of the perpetrator whereby the facts were concealed relieves from the bar of the statute added that the weight of authority was in favor of the further proposition, "That when the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party," so the rule is that, whether the fraud is concealed by special acts of the perpetrator after its commission or is so committed that it conceals itself, reasonable care and diligence of the injured party to discover it are indispensable conditions of the maintenance of a cause of action upon it after the bar of the statute has fallen. The act of Congress declares that suits by the United States to vacate

patents for fraud shall not be brought subsequent to six years after the date of the patents. When the six years have expired such suits are therefore presumed to be barred. And when the injured party invokes the aid of a court of equity to release him from that bar, the burden unavoidably falls upon the plaintiff to plead and prove (1), that it exercised reasonable care and diligence to discover the fraud before the statute of limitations ran, (2) that it had no knowledge or notice of any action which would have excited the attention of and would have incited a person of ordinary prudence and ability in the plaintiff's situation to an inquiry which would have led to a discovery of the fraud, and (3) that the defendant concealed the fraud by trick or artifice, or so committed it that it concealed itself. Hence, the question which the case presents is whether or not the United States has so pleaded these facts as to entitle it to relief by a court of equity from the plain bar of the statute.

By the terms of the act of Congress of March 3, 1891, this suit is forever barred unless the court of equity ought to relieve the plaintiff from that bar on the equitable principle which has been stated. The United States accordingly has invoked the aid of the court of equity and of this equitable principle to secure this relief. The equitable claims of a nation or a State to the conscience of a chancellor with the same, but with no greater or less force, than would those of a private citizen under like circumstances, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the nation or State voluntarily submits them, by every principle and rule of equity applicable to the rights of a private citizen under similar circumstances. United States v. Stinson, 197 U. S. 200, 204, 205; United States v. Detroit Timber and Lumber Co., 131 Fed. 668, 677, 67 C. C. A. 1, 10; United States v. Debell, 227 Fed. 775, 779, 142 C. C. A. 284; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221; United States v. Midway Northern Oil Co., 232 Fed. 619, 631; State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, and authorities there cited.

Nor will mere delay by the United States after the expiration of the six years in the absence of reasonable care and diligence on its part to discover the fraud suffice to induce a court of chancery to grant the relief from the bar of the act of Congress and the maintenance of its suit under the rule and the authorities, such as United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U. S. 120, 125; United States v. Beebe, 127 U. S. 338, 344, 348; United States v. Kirkpatrick, et al., 9 Wheaton 720; Gaussen v. United States, 97 U. S. 584; United States v. Insley, 130 U. S. 263, 266, cited by counsel in support of it, that no time runs against the sovereignty, or as the Supreme Court states it, that the "United States, asserting rights vested in them, as a sovereign Government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound," 118 U. S. 125. And this

because, first, Congress has clearly manifested its intention by the act of March 3, 1891, that mere delay for six years after the date of the patent shall no longer constitute an excuse for failure to bring, and shall be fatal to, a suit to avoid the patent for fraud, unless a court of chancery relieves it from the bar, on the equitable principle which has been stated, and reasonable care and diligence of the party injured to discover the fraud are a sine qua non of such relief and, second, because the judicial affirmance of the contention that the mere delay of the United States without reasonable care or
31 diligence on its part to discover the fraud, warrants the maintenance of a suit to avoid the patent after the six years would, in effect, repeal the act of Congress and authorize the maintenance of such suits as freely after as before the expiration of the six years, and such a decision would constitute pernicious judicial legislation. United States v. Puget Sound Traction, Light & Power Co., 215 Fed. 436, 441.

Hence, the first question in this case is, has the plaintiff averred in its bill of complaint, facts which show that it exercised reasonable care and diligence to discover the fraud, that it had no means of knowledge thereof, no notice sufficient to put it on its guard and call for inquiry, and has it alleged the time when the fraud was discovered the circumstances of its discovery, what the discovery was, and wh it was not made before so that the court may clearly see that th discovery could not have been made before by the exercise of ordinary diligence? For the rule is firmly established by repeated decisions of the Federal courts that all these allegations and more are indispensable to the statement of a cause of action in equity for relief from a statute of limitations on the ground of ignorance of the fraud. Wood v. Carpenter, 101 U. S. 135, 138, 139, 140, 141, 148; Felix v. Patrick, 145 U. S. 317, 321; Badger v. Badger, 69, U. S. 94, 95; Pearsoll v. Smith, 149 U. S. 231, 236; Hardt v. Haidmeyer, 152 U. S. 547, 559. The only facts averred in the bill of complaint pertinent to the question whether or not the plaintiff exercised reasonable diligence to discover the fraud between 1903 when its perpetration was complete and the commencement of this suit on October 11, 1917, were these: The coal company and the entrymen conspired to commit the fraud before they perpetrated it, and, as a part of that conspiracy, they then had an understanding and agreement that they should be silent concerning it and should conceal it. They have done so. "Neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff, as aforesaid, excepting that on or about the month of November, 1916, there was filed in the General Land Office of the United States, at Washington, D. C., a report upon said entries by one John A. Smith, special agent of the Department of the Interior." Ever since that day the Interior Department and the Department of Justice have been diligently
32 investigating the fraud and preparing and instituting judi-

cial proceedings to avoid its effect. At the time the lands were entered and at the time the conspiracy to enter them was formed the coal company was in possession of the land and it has been in possession thereof ever since, and for many years it has been mining these lands and extracting coal therefrom. Each of the entrymen conveyed the portion of these lands that he entered to the coal company immediately after the final entry thereof. The complaint contains no allegations of any other facts tending to show diligence to discover the fraud.

The Supreme Court, quoting from Angell on Limitations, section 187 and note, said in 101 U. S., 141, "The presumption is that if the party affected by any fraudulent transaction or management, might with ordinary care and attention, have seasonably detected it, he seasonably had an actual knowledge of it." The transaction here was in reality a sale of the lands by the United States for cash through its local land officers. The fraud alleged was that the United States was induced by the false representations of the coal company and its agents, the entrymen, to sell the lands to the coal company in the belief that it was selling them to the entrymen. But the coal company was in possession of the lands at the time the sale was made and has been in possession of them and operated them ever since. Possession of real estate is notice to the world of the possessor's title. The entrymen conveyed all these lands to the coal company prior to the year 1904. There is no averment in the bill of complaint that these conveyances were not seasonably recorded. In reality this is a suit to rescind a sale for cash of speculative mining property, a proceeding which demands extraordinary promptness and diligence on the part of him who would rescind, on account of the changing values of the property. It is incredible that, under this state of facts, a vendor to whom the open, continuous, operative possession of the fraudulent vendee gave constant notice of its claim of title ever after 1903, could not or would not, if it exercised ordinary diligence, have discovered to whom it had sold its property long before the six years allotted by the statute expired.

Again the burden was upon the complainant to allege facts disclosing persuasive equitable grounds for excusing its failure to discover and avoid the fraud. The Supreme Court has repeatedly pointed out the averments necessary to be made in a pleading
33 to enable the plaintiff to bear this burden. In Wood v. Carpenter, 101 U. S. 140, 143, it declared that a general allegation of ignorance at one time and knowledge at another, was of no effect, that there must be distinct averments as to the time when the fraud was discovered, what the discovery was, how it was made, why it was not made sooner, that the circumstances of the discovery must be fully stated, and that the delay must be shown to have been consistent with requisite diligence. Over and over again has the Supreme Court approved this statement from Badger v. Badger, 69 U. S. 95, "The party who makes such appeal should set forth in his bill specifically

what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The bill of complaint fails to contain the allegations thus specified and adjudged indispensable to the complainant's alleged cause of action. It contains no averments of any impediments to an earlier prosecution of the plaintiff's claim other than the immaterial fact that it was ignorant of its claim in 1903 and aware of it in 1916. The agreement and understanding of the coal company and the entrymen, to keep silent about and conceal the fraud, is alleged to have been made before it was committed and is therefore merged therein. United States v. Puget Sound Traction, etc., Co. 215 Fed., 436, 440. The complaint contains no allegation of any means used by the coal company after the completion of the fraud in 1903 to keep the plaintiff in ignorance of it. There is nothing in the complaint to show why the fraud could not have been discovered and the suit brought as well as any time after 1903 and prior to 1915 as after the latter date. There is no material averment in it of how and when the plaintiff first came to a knowledge of the matters alleged in the bill. The averment on that subject fails to state any pertinent or material fact except that the plaintiff and all its officers having authority in the premises were ignorant of the fraud until and except that in November, 1916, a special agent of the Interior Department filed a
34 report on the entries on which complaint is made. But the bill contains no statement of the facts this report revealed, of who discovered them, when they were discovered or how or why the special agent made the report, or of any other material facts tending to show that the knowledge of the fraud could not have been discovered as well in 1904 as in 1916. And the conclusion of the whole matter is that the complaint states a case in which, in view of the constant operative possession of the coal company of all the lands in controversy, from prior to 1903 to the present time, and of the conveyance of them to it by the entrymen prior to 1904, the exercise of ordinary care and diligence could and would have discovered the fraud long before the expiration of six years from the dates of the patents, and it fails to contain allegations indispensable to constitute a cause of action in equity to relieve the plaintiff from the bar of the act of Congress of March 3, 1891. The decree below must therefore be affirmed, and it is so ordered.

Filed December 4, 1918.

United States Circuit Court of Appeals, Eighth Circuit.

No. 5146.—December Term, 1918.

WEDNESDAY, *December 4, 1918.*

UNITED STATES OF AMERICA, APPELLANT,
vs.
THE DIAMOND COAL AND COKE COMPANY, a corporation.

Appeal from the District Court of the United States for the District of Wyoming.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this court.

December 4, 1918.

(Petition for Appeal to Supreme Court, U. S., and allowance thereof.)

Now comes the United States of America, appellant, by its solicitors, and complains that in the record and proceedings, and also in the rendition of the decree of the United States Circuit Court of Appeals for the Eighth Circuit, sitting at the city of St.
36 Louis, in the State of Missouri, in the above styled and numbered cause, on the fourth day of December, in the year of our Lord one thousand nine hundred and eighteen, affirming the decree of the United States District Court for the District of Wyoming heretofore entered in said cause on the eleventh day of March, in the year of our Lord one thousand nine hundred and eighteen, manifest error has intervened to the great damage to the petitioner; that the jurisdiction of the District Court of the United States for the District of Wyoming depended upon the fact that the United States of America was party plaintiff suing to cancel certain patents for coal lands alleged to have been obtained by the defendant from the plaintiff, through fraud; the suit involved the construction of a law of the United States; that the amount involved herein and the matter in controversy exceeds the sum of one thousand dollars, besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore, petitioner prays for the allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and such process as is required to perfect the appeal prayed for to the end that the error therein may be corrected.

CHARLES L. RIGDON,
DAVID J. HOWELL,
Solicitors for Appellant.

Appeal allowed this the 25th day of February, A. D., 1919.

WALTER H. SANBORN,
Presiding Judge, U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 25, 1919.

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37 (Assignment of errors on appeal to Supreme Court, U. S.)

Comes now the appellant, United States of America, on this the 25th day of February, in the year of our Lord one thousand nine hundred and nineteen, and files this its assignment of errors upon which it will rely upon its appeal from the decree of the United States Circuit Court of Appeals for the Eighth Circuit sitting at St. Louis, in the State of Missouri, in the above styled and numbered cause on the fourth day of December, in the year of our Lord one thousand nine hundred and eighteen, affirming the decree of the United States District Court for the District of Wyoming in said cause heretofore entered by said court on the eleventh day of March, in the year of our Lord one thousand nine hundred and eighteen;

That said United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree heretofore entered in said case by the United States District Court of Wyoming, to wit:

1. That said court erred in affirming the action of said District Court for the District of Wyoming in sustaining the motion of the appellee, The Diamond Coal and Coke Company, to dismiss the bill of complaint herein.

2. That said court erred in affirming the action of the District Court for the District of Wyoming in making and entering a decree against the appellant and in favor of the appellee, dismissing the bill of complaint herein.

Wherefore, the appellant, United States of America, appealing, prays that the decree entered as aforesaid affirming the dismissal of the bill of complaint herein be wholly set aside, annulled, reversed, and held for naught; that the cause between the appellant and appellee be remanded to the District Court for the District of Wyoming with directions to overrule the motion of the

38 appellee and require the appellee to answer said bill of com-

plaint, and for such other, further, and different relief to which it may in equity and good conscience be entitled.

CHARLES L. RIGDON,
DAVID J. HOWELL,
Solicitors for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 25, 1919.

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39 UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

Citation.

United States of America to The Diamond Coal and Coke Company, a corporation, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, in the District of Columbia, sixty days from and after the date this citation bears date, pursuant to an appeal allowed by the Circuit Court of Appeals of the United States for the Eighth Judicial Circuit, sitting at St. Louis, Missouri, wherein the United States of America is appellant and The Diamond Coal and Coke Company, a corporation, is appellee, to show cause, if any there be, why the order and decree rendered against said appellant, as in said appeal mentioned, should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, presiding, judge of the Circuit Court of Appeals for the Eighth Judicial Circuit, this 25th day of February, A. D. 1919.

WALTER H. SANBORN,
Presiding Judge, U. S. Circuit Court of Appeals, Eighth Circuit.

Service of the above citation is hereby acknowledged this
40 17th March, A. D. 1919.

S. O. EVANS,
W. B. RODGERS,
D. W. KELLEY,
Solicitors for Appellee.

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Wyoming, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States of America was appellant, and The Diamond Coal and Coke Company, a corporation, was appellee, No. 5146, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the fifth day February, A. D. 1919, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of Wyoming.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-sixth day of March, A. D. 1919.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsement on cover:) File No. 27034, U. S. Circuit Court Appeals, 8th Circuit. Term No. 948. The United States of America, appellant, vs. The Diamond Coal and Coke Company. Filed March 29th, 1919. File No. 27034.

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